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In the Supreme Court of the United States

OCTOBER TERM, 1974

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, ET AL., PETITIONERS

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
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Petitioner contends that the procedures by which the Secretary of the Interior assessed civil penalties under the Federal Coal Mine Health and Safety Act of 1969 ("the Act") before March 15, 1973, were invalid.

The Act establishes mandatory health and safety standards to protect the Nation's coal miners. 30 U.S.C. 801, 841, 861. The Secretary is directed to enforce these standards by assessing civil penalties for violations of them by coal mine operators and miners. 30 U.S.C. 819. Section 109(a)(3) of the Act, 30 U.S.C. 819(a)(3), provides;

> A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this chapter has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. * * *

In determining the amount of the penalty, Section 109(a)(1) of the Act requires the Secretary to consider six factors, including the gravity of the violation, whether the coal mine operator was negligent, his efforts to achieve compliance and any history of previous violations, as well as the size of his business and the effect of the penalty on his ability to continue in operation. 30 U.S.C. 819(a)(1).

Payment of the penalty may be enforced by the Secretary only by a petition for enforcement in the appropriate district court; in that proceeding, the coal mine operator is entitled, with exceptions not here material, to a trial *de novo* concerning all relevant issues, 30 U.S.C. 819(a)(4).

Under the procedures in effect when this suit was instituted, each of the approximately 80,000 violations of the Act reported each year was reviewed and evaluated by an agency assessment officer, who then sent the coal mine operator involved a proposed order of assessment. That document specified the notice of violation (previously furnished the operator) upon which it was based, recited that the statutory factors had been

considered, and stated the amount of the proposed penalty, 30 C.F.R. 100.3(b) and (c) (1973).[1] The operator could protest the proposal and obtained reconsideration by the assessment officer; in addition, he was entitled to a formal hearing, resulting in a decision incorporating findings of fact, 30 C.F.R. 100.3(d)-(h), 100.4 and 100.5 (1973).[2] If the coal operator did not request a hearing, the proposed or reissued order of assessment became the Secretary's final assessment order, 30 C.F.R. 100.3 (e) and (h) (1973), and, if unpaid, formed the basis for the Secretary's petition for enforcement in an appropriate district court.

Petitioners sought a declaratory judgment that these procedures were inconsistent with the Act, because they did not require findings of fact for all penalty assessment orders; they also sought an injunction against the further utilization of the procedures. The district court issued such an injunction, and the procedures were suspended on April 24, 1973.[3]

The court of appeals reversed, concluding that the Act, in light of its legislative history, does not require a formal decision with findings of fact unless the operator requests a hearing. But instead of reinstituting

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[1]The Part 100 procedures were modified in June 1972 (37 Fed. Reg. 11861-11862); it was the modified version, rather than that reproduced in petitioner's Appendix D, which was enjoined by the district court. The differences in the two versions are not material to the disposition of this case. We are lodging a copy of the modified version with the Clerk.

[2]The burden of proving both the occurrence of the violation and the appropriateness of the penalty was on the agency in those proceedings, 43 C.F.R. 4.587.

[3]They were replaced by interim formal hearing procedures in all cases, 38 Fed. Reg. 10085, pending appeal of the district court's judgment.

the original Part 100 procedures, the Secretary issued a new Part 100, effective August 1, 1974. 39 Fed. Reg. 27558-27561.[4]

The new Part 100 establishes an assessment formula for determining proposed penalties. Moreover, under the new prodecures, all proposed assessments will be accompanied not only, as before, by a reference to the notice of violation and a statement of the amount of the proposed penalty, but also by formula determinations ("penalty points") resulting from the application of the six statutory criteria to each violation. Thus, the operator is now in effect provided with findings of fact even when he does not request a hearing.

Accordingly, there is no occasion for this Court to review the conclusion of the court below concerning procedures that are no longer in effect.[5]

As petitioners note, the conclusion of the court below that the old assessment procedures complied with the Act is in conflict with the decision of the Third Circuit in *Morton v. Delta Mining, Inc.*, 495 F. 2d 38. We have filed a petition for a writ of certiorari in that case, since it directly affects the Secretary's ability to enforce thousands of assessment orders issued under the old procedures.[6] Therefore, *Delta Mining*, unlike the instant case, involves a question of continuing

[4]These regulations are contained in Appendix F in our petition for a writ of certiorari in *Morton* v. *Delta Mining, Inc.*, filed November 1, 1974.

[5]In any event, we submit that the court below was correct, for the reasons stated in our petition for a writ of certiorari in *Morton* v. *Delta Mining, Inc.*, a copy of which we are furnishing petitioners.

[6]Petitions for enforcement of assessment orders must be brought in the appropriate district court, 30 U.S.C. 819(a)(4). Since there are no coal mines in the District of Columbia, that circuit's views on the validity of the old Part 100 procedures cannot control the outcome of any action to enforce penalties assessed under those procedures.

importance to the enforcement of the Act. While we agree with petitioners that the uncertainty concerning the validity of the original procedures caused by the disagreement among the circuits should be resolved, we submit that the proper case in which to resolve that uncertainty is *Delta Mining*, not the instant case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

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